

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 591 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ARJUNBHAI MELABHAI

Versus

STATE OF GUJARAT

Appearance:

MR KR RAVAL for Petitioner
MR SR DIVETIA, APP, for Respondent No. 1

CORAM : MR.JUSTICE S.M.SONI and
MR.JUSTICE J.R.VORA

Date of decision: 27/03/98

ORAL JUDGEMENT (Per S.M.Soni, J.)

Appellant original accused No.1 in Sessions Case No.133/90 is convicted under section 302 of the Indian Penal Code and sentenced to rigorous imprisonment for life by the Additional Sessions Judge, Bharuch by the judgment and order dated 1st June, 1991. The said

judgment and order is under challenge in this appeal.

Facts of the prosecution case, in brief, are as under:

Deceased Babar was residing with his father and mother. Complainant, PW 1, Chandu Gamanbhai who is residing with his wife and children in Navinagri had gone to visit his parents by about 6 O' clock on 30th March, 1990. By about 7 O' clock, Babar who was sitting with him had gone to Bhathuji Mandir for lighting lamp. Said Bhathuji Mandir is located just behind his house. After Babar left for lighting lamp, within a short time, PW 1 and others heard some commotion. On hearing the same, father of PW 1, Ramesh Ranchhod, PW 2, Soma Karsen and PW 1 proceeded towards that place in haste. There they saw that his brother Babar was caught hold by one Nagji Soma and Chandu Mangu from behind by locking him with hands and Arjun Mela, accused No.1, inflicted with force blow of knife saying that "why are you defaming by involving my name for illicit relationship with your Babhi". So saying he immediately inflicted blow of knife on throat and second blow was inflicted on the head. Babar fell down then and there. On complainant and others reaching there, they ran away. Arjun, accused No.1 took away knife with him. Babar was found dead. PW 1 and Ramesh Ranchhod, PW 2, therefore went to Wagara Police Station in a tempo and registered complaint. On offence being registered, Sababsinh, PW 8 investigated into the offence and on completion of the same submitted chargesheet against the appellant and two others in the Court of Judicial Magistrate, First Class, Bharuch. The learned Judicial Magistrate, First Class, then committed the case against the accused to the court of Sessions as the offence charged against the accused was exclusively triable by the court of Sessions.

The learned Addl. Sessions Judge, Bharuch, framed charge against the accused to which the accused pleaded not guilty. The prosecution then led necessary evidence to prove the charge levelled against the accused and on completion of the same further statement of the accused was recorded. Accused No.1 also has given written statement vide Ex.30. From the nature of cross-examination of prosecution witnesses and further statement of the accused, it appears that the defence of the accused is of total denial. They have not led any evidence in defence. The learned Addl. Sessions Judge, after hearing the learned advocates for the prosecution and defence held the accused No.1 guilty of offence punishable under section 302 of the IPC and acquitted

accused No.2 & 3 of the charges levelled against them. This judgment and order of conviction of accused No.1 is under challenge in this appeal.

Learned advocate Mr K.R. Raval has challenged the conviction on the ground that the prosecution has failed to prove the charge levelled against this accused beyond reasonable doubt. The learned Addl. Sessions Judge ought not to have accepted the evidence of eye witnesses PW 1, 2 & 6 as they are interested and partisan witnesses and their evidence fall short of any independent corroboration. Mr Raval contended that panchnama of scene of offence and the seizure of knife are not duly proved which should be read adversely to case of the prosecution. Mr Raval contended that the investigation in the instant case is not proper and in accordance with law. Investigation is biased, unjust and carried out with a view to help the prosecution. Mr Raval contended that adverse inference must be drawn against the prosecution for non-examination of material witnesses. Mr Raval, therefore, contended that the appeal should be allowed and the accused should be set at liberty.

Mr Divetia, learned APP, supports the judgment in the instant case. Mr Divetia contended that simply because the panchnama of scene of offence and seizure of knife are not proved that does not affect the ocular evidence which even otherwise is acceptable. Mr Divetia contended that the ocular evidence in the instant case is cogent and convincing and acceptable. Mr Divetia contended that simply because the investigation is not proper, he contends this without admitting it, the prosecution should not suffer. Mr Divetia contended that irregularity and incompetence in the investigation should not make to suffer the administration of justice unless the said investigation is proved to be bias, unjust and has involved wrong person as an offender. Mr Divetia contended that in criminal trial, it is not that all eye witnesses are required to be examined. It is for the prosecuting agency to decide which witness should be examined and which witness to be dropped. Therefore, non-examination of some of the witnesses whose names are revealed in evidence does not make it obligatory on the prosecution to examine them. Mr Divetia contended that in view of these facts, the appeal should be dismissed.

The prosecution has relied on 3 witnesses, namely, Chandu Guman (PW 1), Ramesh Ranchod (PW 2) and Jiviben Guman (PW 6). PW 1 is the brother of the

deceased, PW 6 is the mother of the deceased and PW 2 is first cousin of the deceased. Deceased was residing with his father in Dehri falia. PW 2 was also residing in Dehri. PW 1 had come at Dehrifalia from his village Keshvan on the date of incident to visit his parents. In the evening of 30th March, 1990 at about 7.00 p.m., they heard some commotion after Babar had left for lighting lamp in Bhathuji Mahadev Temple about an hour before. On hearing that commotion, PW 1, his father and one Soma Karsen had gone to the place where the commotion took place. PW 1 saw there that accused No.2 & 3 had held Babar from behind. (The word used in deposition in Gujarati is "avle hathe". "Avle" in Gujarati means "which is not in the front". 'Hathe' means by hand.) At that time, Arjun had told Babar that "why do you defame me by joining my name with your Bhabhi" (brother's wife). So saying, he inflicted a blow of knife on throat and second blow on head. In the cross-examination of this witness, an attempt is made to show that the days were of winter. Month of March is not a month of winter in Gujarat. Place of commotion referred to by the witness is just behind the house of Babar. However, the way to go there was not from behind, but has to go from outside. He has denied the suggestions in the cross-examination that there was no light, that he was not in the house of his father at the relevant time and that he has not seen the commission of offence as alleged by him. This witness has specifically referred to two injuries, one on the throat and the other on the head and this part of evidence is corroborated by the evidence of the Medical Officer, PW 7, Dr. Ajaykumar. In the cross-examination by accused Nos.2 & 3, this witness has admitted that he has not stated in his complaint "I went and saw that Chandu and Nagji has held Babar from behind". In our opinion, this does not appear to be a correct statement. Complaint is exhibited at Ex.29, wherein it is stated that Chandu and Nagji has held Babar from behind, but has not used the word 'avle hathe'. The exact words used in the complaint were that Nagji Soma and Chandu Mangu, both were standing holding Babar in grip by hand. In our opinion, this conveys the same meaning and this cannot be said to be a contradiction. The learned Addl. Sessions Judge has treated this to be a contradiction and has acquitted accused Nos.2 & 3, which in our opinion appears to have been based on some misconception of facts. As accused Nos.2 & 3 have been acquitted, we are not concerned at this stage, as there is no appeal by the State against the order of acquittal. But that does not prevent us from reading the evidence properly while considering the case of the appellant. We are not able find anything in the cross-examination of PW 1 to reject

his evidence.

Evidence of PW 1 is further corroborated by the evidence of PW 2. PW 2 is an ordinary resident of Dehri falia. When he heard commotion at his house, he came out and went towards the temple and there he saw that his brother Babar was held by accused No.2 & 3 and accused No.1 inflicted knife blow. Babar had told Arjun that why he is keeping illicit relations with his bhabhi and this was so said by Babar some 15 days before. This witness has also stated that one blow was inflicted on throat and other on the head. In the cross-examination of this witness, the witness has admitted that in his statement before the Police he has not used the word 'avle hathe'. The witness has denied in the cross-examination that when he went at the place of incident, they only saw Babar lying there. He has denied that he has not seen accused No.1 inflicting knife blow on Babar. In our opinion, this witness PW 2 corroborates the say of PW 1. Evidence of PW 1 and PW 2 is further corroborated by the evidence of PW 5, mother of the deceased. PW 6 has stated that on hearing the commotion, she went towards that place and saw that Arjun Mela has inflicted knife blow on throat of her son Babar. She stated that Arjun inflicted two blows of knife on head. This witness in the cross-examination has also denied that she has stated before the Police that she had gone there after the incident was over. She has denied that there is a pit at the scene of offence. Thus, in our opinion, the evidence of PW 1, PW 2 and PW 6 conclusively establishes the fact that they saw deceased Babar was held from behind by accused No.2 & 3 and accused No.1 inflicted one knife blow on the throat and other on the head.

Learned advocate Mr Raval has challenged the evidence of this witnesses alleging that they are partisan and interested witnesses. True that these are interested witnesses. But they cannot be said to be partisan witnesses. Interested one because deceased is the brother of PW 1 and 2 and son of PW 6. In our opinion, this is the reason that they would like and wrongly involve the accused. Why should these witnesses implicate a wrong man and allow the real culprit for the murder go free ? There is nothing on record to show that these witnesses have anything against the accused which may inspire to implicate the accused wrongly and allow the real culprit to go away for the murder of Babar. Simply because the witnesses are relations, it is not a disqualification. The incident took place just behind the house of Babar near the temple. Any hubbub, cry and commotion near temple could be heard in the house of PW

6. Time of incident is such that all the members of the family would have returned home and presence of these witnesses at home cannot be said to be unnatural. Therefore, if these witnesses have gone near and have seen the incident, their evidence cannot be said to be unnatural and suspicious.

Learned advocate Mr Raval has contended that according to PW 1 and PW 2, Gamanbhai and Soma Karsen have also gone to the place of incident and non-examination of said Gamanbhai and Soma Karsen entitles the defence to request the court to draw adverse inference against the prosecution. The question is what adverse inference could be drawn for non-examination of Gamanbhai and Soma Karsen. Under the provisions of law adverse inference would be that they may not support the case of the prosecution. Not supporting the case of the prosecution does not lead to an inference that the incident has not taken place and the accused have not committed the offence. Therefore, non-examination of these witnesses, in our opinion, does not prejudice the case of the prosecution in any manner whatsoever.

Mr Raval further contended that in the present case, panchnama of scene of offence and seizure of knife are not proved and therefore it vitiates the trial. In our opinion, this is a fantastic argument. Evidence of panchnama of scene of offence and seizure of weapon used for commission of offence are piece of evidence to support the say of eye-witnesses or important circumstances which may lead to conclude the involvement of accused in commission of offence. If panchnama is not proved than that evidence would not be available to the prosecution to support its case. If seizure of weapon is not proved, that piece of evidence may not be available to the prosecution. But simply because of panchnama of scene of offence and seizure of weapon are not proved, it does not vitiate the prosecution itself. The prosecution may be a little weak, but that by itself does not create a doubt in the version of the prosecution if the case of the prosecution is otherwise acceptable. In the instant case, though panchnama of scene of offence is not proved, the scene of offence, location and such other things come on record by evidence of PW 1 and PW 2 who have reached at the scene of incident immediately on hearing commotion and this evidence makes the non-proof of panchnama of scene of offence insignificant. So far as the seizure of knife is concerned, it is not necessary that in every criminal case weapon is required to be found and if not found, the prosecution case fails. So will be the effect in the instant case.

In view of the above discussion, we do not find any reason to discard the evidence of PW 1, 2 and 6 and the conclusion arrived at by the learned Addl. Sessions Judge that it is the accused who has inflicted two knife blows, one on throat and other on the head of deceased Babar.

The prosecution through the evidence of Dr.PW 7 has proved that the deceased two external injuries, namely:

- "1. Incised wound of about 2 3/4" x 1 1/2" x 1/4" deep (skin & muscle deep). Oval in shape, oblique in direction on the parietal region of scalp towards occipital region more on right side skin and muscle together around this area is almost completely removed. Only a tiny portion remain. So cut portion of skin and muscle hanging towards occipital region.
2. Incised wound of about 2 3/4" x 1 1/4" x 2 1/2" deep resembling like a hollow at the junction of front of neck and chest around and above the supra-sternalnotch, oblique in direction and oval in shape, clean cut and everted margin. Trachea is clearly visible from wounded area. This hollow area is filled with dark red blood and gha-bajri was stick upon the wound.

The deceased has died due to shock due to profuse internal haemorrhage of the chest and suffocation. Dr.PW 7 has specifically said that injury No.2 was sufficient in the ordinary course of nature to cause death. However, injury No.1 was not sufficient in the ordinary course of nature to cause death. Injury No.1 is on the head and injury No.2 is on the throat. Some suggestions are made in the cross-examinations of the doctor. But one fact which conclusively emerges is that the deceased has died a homicidal death due to injury No.1 and 2 and the said injuries are caused by the accused. He has been rightly held, in our opinion, guilty of offence punishable under section 302 of IPC.

In view of the above discussion, we do not find any reason reason to interfere with the findings arrived at by the learned Addl. Sessions Judge.

In the result, the appeals fails and is dismissed.

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(vjn)